In the High Court of Uttaranchal, at Nainaital.

Criminal Jail Appeal No. 247/2004

Hari Babu @ Hari Bahadur
S/o Kharak Singh
R/o Ward No. 7, Haldu Khal Thana Mahendra
District Kanchanpur, Nepal ... Appellant.

Versus

State of Uttaranchal .. Respondent.

Sri Sobit Saharia, learned Amicus Curiae for the appellant.
Sri A. Rad, learned Addl. G.A. for the State.

Hon'ble B.C. Kandpal, J.

This jail appeal has been preferred by accused Hari Babu @ Hari Bahadur, against his conviction and sentence passed by Special Sessions Judge, Champawat, in Special Trial No. 1/2004, State Versus Hari Babu Khatri @ Hari Bahadur, vide his judgment and order dated 4-6-2004, whereby the accused was convicted U/S 20 N.D.P.S. Act and was sentenced to undergo 10 years Rigorous Imprisonment and fine of Rs. One Lac and in default of payment of fine to further fundergo R.I. for three years.

2- Briefly stated, the prosecution case, is that on 27-11-2003, S.I. K.P. Singh along with other police personnel were on petrol duty and when they reached at Pillar No.8 near Sharda Canal situate at India-Nepal Border, they proceeded on foot about 300 paces in the jungle and then they saw a pedestrian coming from the jungle path. Seeing the police personnel that person started walking fast. On being suspicion, the police personnel chased him and he was caught at about 2-30 P.M. near Pillar No.8 on Indian territory. He was

apprehended by the police party and he disclosed his name as Hari Babu resident of Nepal. He was having a bag on his shoulder. He confessed that he was having 3 Kgs Charas in his bag. The raiding party asked the accused as to whether he wanted his search by a Magistrate or a Gazetted Officer, but he refused to do so and wanted his search to be made by the raiding party itself. Therefore, the S.I. K.P. Singh in the presence of other police personnel took the search of the accused and found 3 Kgs Charas kept in a polythene packet inside the bag. The accused could not show any licence for keeping the Charas with him. The accused was told his offence and thereafter was taken into custody along with the contraband article. Out of the recovered contraband article, 250 grams was taken out for sample and was sealed in a packet. Recovery memo Ext. Ka.2 was also prepared at the spot. Thereafter the accused was brought to Police Station along with the recovered contraband and a case U/S 18/20 N.D.P.S. Act was registered against him, the chick F.I.R. Ext. Ka.5 was also drawn at the Police Station. The Station Officer, B.C. Pant investigated the case. He visited the spot and prepared site plan Ext. Ka. 8. The sample was sent to Forensic Lab for examination. After completion of the investigation he submitted charge sheet, Ext. Ka.9 against the accused.

3- The accused denied the charge before the trial court and claimed his trial.

4- The prosecution to establish its case examined P.W.1 S.I. K.P. Singh, P.W.2 Constable Satish Babu, P.W.3, Constable Laxman Singh, P.W.4, S.O. Bipin Chandra Pant, I.O. of the case and P.W.5, Constable Hansraj Singh.

5- P.W.1, S.I. K.P. Singh and P.W.2, Constable Satish Babu are the members of raiding party. Both of them have narrated the prosecution case and supported the allegation of recovery of 3 Kgs. Charas from the accused as disclosed in the support lodged at the Police Station.

6- P.W.3, Constable Laxman Singh at the time of incident was posted at P.S. Banbasa. He deposed that on 27-11-2003 S.I. K.P. Singh along with other police personnel along with the contraband article and the accused came at the Police Station and deposited the same at the Police Station. He prepared the Chick F.I.R. of the incident and registered a case against the accused.

7- P.W.4, S.O. B.C. Pant conducted the investigation in the case and proved the prosecution papers prepared by him.

8- P.W.5, Constable Hansraj Singh has handed over the sample of Charas to the Forensic Lab for examination. He deposed that he had handed over the sample to the Forensic Lab in sealed condition and there was no tampering of the seal.

9- The accused in his statement U/S 313 Cr.P.C. denied the allegations of the prosecution and alleged that when he get-down from the bus, he was caught by police and false case was lodged against him.

10- The Special Judge, on appraisal of evidence on record and having heard learned counsel for the parties, found the accused guilty for an offence U/S 20 N.D.P.S.

Act and was sentenced to undergo 10 years Rigorous Imprisonment and fine of Rs. One Lac and in default of payment of fine to further fundergo R.I. for three years.

11- Feeling aggrieved, the accused preferred this appeal from jail.

12- I have heard learned Amicus Curiae, learned A.G.A. and perused the record.

13- The prosecution has produced K.P. Singh – S.I. (P.W.1) as a witness in whose leadership the appellant/accused was arrested with the narcotic contraband. This witness has deposed in his statement that on the date of occurrence i.e. 27.11.2003, he along with constable Satish Babu (P.W.2) and constable Laxman Singh were going on a patrol duty and when they reached at pillar No. 8 near Sarda Canal, they saw a person coming to their side but he all of a sudden started moving fast towards the opposite direction and when the police party asked him to stop, he did not. Thereafter, the police arrested him in jungle. This person disclosed his name as Hari Babu Khatri. He was having a bag hanging on his shoulder, which was containing approximately 3 kg of *Charas*. The police party thereafter took the accused in custody along with the recovered contraband and performed all the formalities at the spot.

14- Constable Satish Babu (P.W.2) is another witness of the occurrence. This witness was in the company of S.I. – K.P. Singh (P.W.1) at the time of the occurrence. He has corroborated the version of the S.I. K.P. Singh (P.W.1). He has also stated that S.I. – K.P. Singh asked the accused/appellant as to whether he

wanted to be searched by a Gazetted Officer or a Magistrate but the accused/appellant replied that the raiding party should search him. Thereafter, the raiding party searched him and recorded a *Charas* being approximately 3 kg.

15- Nothing has come out in the cross-examination of these two prosecution witnesses with regard to the arrest of the accused as well as the recovery of the narcotic contraband from his possession which may suggest that these witnesses are either telling lie or have any reason to implicate the accused falsely. There is no material contradiction in the statement of the prosecution witnesses pertaining to the arrest of the accused along with the *Charas* being 3 kg from his possession.

16- Learned counsel for the appellant has argued that no independent witness was taken by the raiding party, therefore, in the absence of any independent witness, the recovery of the alleged *Charas* from the possession of the accused becomes doubtful.

17- I fail to appreciate the argument advanced by the learned counsel for the appellant. Record shows that the incident has taken place in a dense forest. The police was on the patrol duty and the accused met the police all of a sudden. In the dense forest, it was not possible for the police party to procure any independent witness. Therefore, merely on this count the prosecution story cannot be disbelieved.

18- The recovery of the huge quantity of *Charas* from the possession of the accused/appellant cannot be disbelieved on the technical ground.

19- As far as the compliance of Section 50 of N.D.P.S. is concerned, I am again of the view that the same is not applicable to the facts and circumstances of the present case as in the instant case, the recovery of the narcotic contraband is from the bag which was recovered from the possession of the accused.

20- The accused was also arrested all of a sudden in a jungle and it is a case of chance recovery, therefore, there was no question of compliance of Section 50 of the N.D.P.S. Act. The facts and circumstances of the present case are covered by the decision of the Hon'ble Apex Court reported in ***1999 (2) ACR Page 1694 (SC) State of Punjab Vs Baldev Singh.*** Therefore the accused/appellant is also not liable to be acquitted on this ground.

21- Learned counsel for the appellant has further argued that the link evidence with regard to this particular fact that the alleged recovery of *Charas* from the possession of the accused/appellant was kept intact and remained in the safe custody and sent to the Public Analyst, has not been produced by the prosecution. Therefore, the conviction of the appellant, without having any link evidence to this aspect, is bad.

22- I again do not find any force in this argument.

23- The police personnel who took the sample to the Forensic Lab, Agra is available as paper No. 9 ka on the record and it shows that the police personnel took the sample along with his verified signature to the forensic Lab, Agra. Head constable C.P. Hansraj P.W.5 was sent to the laboratory with the sample and he has

stated in his deposition that he took the sample before the court and his signatures were verified by the Presiding Officer of the court on 16.12.2003, thereafter he took the sample to Public Analyst Forensic Lab, Agra and on 19.12.2003, he submitted that sample.

24- This witness has also stated that he took the sample from the *malkhana* of the police station in sealed condition and he took that sealed sample to the Public Analyst and the sample remained in a safe custody till it was submitted in the Laboratory. Therefore, on the basis of the deposition of C.P. Hansraj (P.W.5) it is quite clear that the prosecution has produced the evidence in this regard that the sample which was taken from the recovered *Charas* at the spot was kept intact in *Malkhana* and then it was sent to Public Analyst Forensic Lab, Agra in a sealed condition and thee was no tampering with the seal of the sample in between.

25- The defence could not show anywhere in the evidence that the accused/appellant has been implicated by the police on account of any enmity.

26- The recovery of the huge amount of *Charas* i.e. 3 kg from the possession of the appellant cannot be doubted on the basis of conjecture or surmises.

27- For the reasons stated above, I come to the conclusion that the accused/appellant, Hari Babu @ Hari Bahadur has been rightly convicted and sentenced by the trial court under Section 20 N.D.P.S. Act.

28- I do not find any ground for interference in the impugned judgment and order dated 04.06.2004 passed by the trial court convicting the appellant under

Section 20 N.D.P.S. Act and sentencing him to 10 years rigorous imprisonment and fine of Rs. One Lakh and in default of payment of fine further rigorous imprisonment for three years.

29- Accordingly, the appeal lacks merit and is liable to be dismissed.

30- Accordingly, the appeal is dismissed.

(B.C. Kandpal, J.)

07.08.2006
ASWAL